FILE COPY

Office - Supreme Court,
FILED
MAY 11 1950
CHARLES ELMORE CROPLEY

Supreme Court of the United States.

OCTOBER TERM, 1949.

No. 770.

CHARLES McGARTY,
PETITIONER,

v.

JOHN J. O'BRIEN,
WARDEN OF THE MASSACHUSETTS STATE PRISON,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

FRANCIS E. KELLY,
Attorney General,
HENRY P. FIELDING,
Assistant Attorney General,
LAWRENCE E. RYAN,
Assistant Attorney General,
MAURICE M. LYONS,
District Attorney, Southern District,
Attorneys for Respondent.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

Subject Index.

	Page
The case	1
Jurisdiction	1
Statement of facts	2
Statement of particular points intended to be relied upon	5
Argument	6
I. The petitioner is not entitled to relief by habeas corpus in the federal courts inasmuch as he has not exhausted at least one of his available remedies in the state courts	6
II. The petitioner has not been denied due process of law, nor has he been deprived of any right in violation of the Fourteenth Amendment of the Constitution of the United States	14
Conclusion	22
Appendix	23

Table of Authorities Cited.

CASES.

Allen v. Commonwealth, Mass. Adv. Sh. (1949) 879	12
Attorney General, petitioner, 104 Mass. 537	18
Betts v. Brady, 316 U.S. 455	20
Brewer v. Hunter, 163 F. (2d) 341	21
Bute v. Illinois, 333 U.S. 640	15, 20
Carangias v. Market Men's Relief Assoc., Inc., 293 Mass. 284	10
Casebeer v. Hudspeth, 121 F. (2d) 914	21
Clark, petitioner, 104 Mass. 537	19
Commonwealth v. Belenski, 276 Mass. 35	17
Commonwealth v. Devereaux, 257 Mass. 391	17
Commonwealth v. DiStasio, 294 Mass. 273	17

	Page
Commonwealth v. Marsino, 252 Mass. 224	12
Commonwealth v. McGarty, 323 Mass. 435	4, 5, 12, 18
Commonwealth v. Sacco, 261 Mass. 12	11, 12
Commonwealth v. Williams, 13 Mass. 501	21
Crews v. State, 143 Fla. 263	21
Darr v. Burford, on writ of cert. to U.S. Court of Appeals, Tenth Cir., dec. by U.S.S.C. Apr. 3, 1950	7
Dascalakis v. Commonwealth, 244 Mass. 568	12
Gates v. United States, 112 F. (2d) 571	21
Goldsby v. United States, 160 U.S. 70	21
Greene v. Ballard, 174 Ky. 808	21
Hawk, ex parte, 321 U.S. 114	6
O'Leary, Petitioner, Mass. Adv. Sh. (1950) 21	12
Osborn v. People, 83 Colo. 4	21
Pepper v. Old Colony Trust Co., 268 Mass. 467	13
Powers v. Sturtevant, 200 Mass. 519	13
Roberts v. The State, 94 Ga. 66	21
Rosenthal v. Liss, 269 Mass. 373	10
Snyder v. Massachusetts, 291 U.S. 97	14
State v. Nathaniel, 52 La. Ann. 558	21
State v. Waters, 39 Me. 54	21
United States v. Fore, 38 F. Supp. 142	21
United States v. Fox, 19 F. Supp. 463	21
Vigeant v. Postal Telegraph Cable Co., 260 Mass. 335	10
Wade v. Mayo, 334 U.S. 672	7
White v. Ragen, 324 U.S. 760	7
Winchester v. Winchester, 121 Mass. 127	13

STATUTES.

Constitution of Mass., Declaration of Rights, art. 12	12
Constitution of U.S., Fourteenth Amendment.	6, 11, 12, 14, 20, 21, 22

	Page
Constitution of U.S., Sixth Amendment	20, 21
18 U.S.C. § 3005	21
28 U.S.C. § 1254 (1)	1
28 U.S.C. § 2254	6
Mass. G.L. (Ter. Ed.) c. 123, § 100A, as amended by St. 1941, c. 194, § 11	16, 18, 19
Mass. G.L. (Ter. Ed.) c. 211, § 3	12
Mass. G.L. (Ter. Ed.) c. 250, § 9	11
Mass. G.L. (Ter. Ed.) c. 250, § 11	11
Mass. G.L. (Ter. Ed.) c. 277, § 56	18
Mass. G.L. (Ter. Ed.) c. 277, § 66	16
Mass. G.L. (Ter. Ed.) c. 278, § 29, as appearing in St. 1939, c. 271, § 1	11
Mass. St. 1921, c. 415	18
Mass. St. 1941, c. 194	17n.
Federal Rules of Criminal Procedure, Rule 17 (b)	21
Mass. Superior Court Rules (1932), Rule 96	18

Supreme Court of the United States.

OCTOBER TERM, 1949.

No. 770.

CHARLES McGARTY,
PETITIONER,
v.
JOHN J. O'BRIEN,
WARDEN OF THE MASSACHUSETTS STATE PRISON,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

The Case.

This is a petition for writ of certiorari to review and reverse a judgment of the United States Court of Appeals for the First Circuit affirming an order of the District Court of the United States for the District of Massachusetts dismissing a petition for habeas corpus.

Jurisdiction.

The jurisdiction of this Court is now invoked under Title 28 U.S.C. § 1254 (1).

Statement of Facts.

On November 12, 1947, the petitioner herein was indicted by the Grand Jury for the County of Bristol, Massachusetts, for the crime of murder (R. 5). On November 13, 1947, he was set at the bar and pleaded not guilty (R. 6). He filed a motion in the Superior Court for Bristol County in which he alleged he was charged with a capital crime and that he was without funds to procure counsel to defend himself; he requested the court to assign counsel for his defense and suggested that James Seligman of Fall River be named (R. 7). This motion was allowed (R. 8).

On December 23, 1947 (R. 20), a report, signed by R. M. Chambers, M.D., and Roderick R. Dexter, M.D., to the Department of Mental Health of the Commonwealth was filed with the court in which report the following conclusion was reached by the examining physicians concerning the petitioner:

> "Our conclusion after careful consideration is that he is neither feebleminded nor insane, and that he does know the difference between right and wrong. We do believe, however, that the anti-social tendencies which he has presented since early childhood warrant a diagnosis of Psychopathic Personality and he has been so classified" (R. 19, 20).

On January 15, 1948, the petitioner filed a motion in the Superior Court for Bristol County in which he requested that he, being without funds, be allowed to employ two psychiatrists at the expense of the Commonwealth so that he might properly defend himself against the crime as charged (R. 20). This motion was brought before the court on January 26, 1948, was argued by counsel, and was denied by the court, the petitioner saving an exception (R. 14, 21).

On February 16, 1948, the petitioner was set at the bar to be tried before a jury in the Superior Court for Bristol County; and on February 28, 1948, the jury returned a verdict of guilty of murder in the first degree (R. 15). The petitioner was sentenced to suffer the punishment of death, but a stay of execution of his sentence was ordered until the petitioner's assignments of error were determined by the Supreme Judicial Court for the Commonwealth (R. 9).

On March 8, 1948, the petitioner filed the following claim of appeal to the Supreme Judicial Court:

> "Now comes the defendant in the above entitled matter and within the time allowed by law brings this, his Claim of Appeal, being aggrieved by the opinions, rulings, direction and judgment of the Superior Court, rendered on questions of law, arising out of said case and whose exceptions thereto have been seasonably saved" (R. 9, 10).

The petitioner's brief before the Massachusetts Supreme Judicial Court, filed October 25, 1949, contained the following:

> "The defendant's motion that he be allowed to engage medical experts to examine him should have been allowed. In the light of the findings of the experts for the Commonwealth, it could not be argued that any undue respite or delay would have resulted. He was not a normal person mentally. Even though the psychiatrists did not find him insane or feebleminded his history from childhood was one of delinquency and anti-social tendencies. The alienists made such a conclusion and the resultant diagnosis of psychopathic personality.

"The defendant was without funds for the preparation of his defense. Therefore, he was unable to engage competent medical experts to examine, assist and advise in the preparation of his defense. It seems but reasonable to conclude that this very situation was contemplated when Section 56 of Chapter 277 of the General Laws (Ter. Ed.) was enacted. While it is not contended by the defendant that this provision contains a mandate to the court to grant a motion that he be allowed to engage medical experts, nevertheless it is most emphatically urged that the gravity of the facts and circumstances surrounding him in connection with the most serious of allegations warranted an authorization for employment of medical experts to the end that all of his constitutional rights should be safeguarded" (R. 27, 28).

"Therefore, it would seem that it was the bounden duty of the court to have allowed the motion and that failure to do so constituted abuse of judicial discretion and prejudicial error" (R. 32).

In passing upon this assignment of error the Massachusetts Supreme Judicial Court in *Commonwealth* v. *McGarty*, 323 Mass. 435, declared at page 437:

"The first error assigned is the denial by the judge of the defendant's motion to engage medical experts for him. It appeared that the defendant was intemperate, had been arrested for drunkenness, and had been drinking to excess shortly before the crime. The two physicians who examined him under G.L. (Ter. Ed.) c. 123, § 100A, reported that he is neither feebleminded nor insane, but has a psychopathic personality. We assume that the judge could have granted the motion under G.L. (Ter. Ed.) c. 277, § 56. But the matter

was discretionary. Nothing in the medical report and nothing in the record indicated that the defendant was not mentally responsible. We find no error in the denial of the motion. *Commonwealth* v. *Belenski*, 276 Mass. 35, 44" (R. 22, 23).

By rescript dated December 2, 1948, the Massachusetts Supreme Judicial Court ordered that the judgment of the Superior Court for the County of Bristol in the case of *Commonwealth* v. *Charles A. McGarty* be affirmed (R. 10). On motion of the District Attorney the stay of execution of sentence previously granted was revoked and the petitioner was remanded to the custody of the Warden of State Prison under sentence previously imposed (R. 10, 11).

On June 29, 1949, the petitioner filed his petition for a writ of habeas corpus in the District Court of the United States for the District of Massachusetts (R. 1).

Statement of Particular Points Intended to be Relied Upon.

The respondent intends to rely upon the following points:

The court below properly dismissed the petition because—

1. The petitioner is not entitled to relief by habeas corpus in the federal courts inasmuch as he has not exhausted at least one of his available remedies in the state courts.

(*a*) The petitioner has never raised in the state courts the constitutional issue now relied upon as a basis for his petition.

(*b*) There are available to the petitioner adequate corrective processes in the state courts by which this constitutional issue can now be raised and determined.

2. The petitioner has not been denied due process of law nor has he been deprived of any right in violation of the Fourteenth Amendment of the Constitution of the United States.

Argument.

I. The petitioner is not entitled to relief by habeas corpus in the federal courts inasmuch as he has not exhausted at least one of his available remedies in the state courts.

Authority of federal district courts to issue a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court is governed by Title 28 U.S.C. § 2254.

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

This statute is merely declaratory of the existing law as enunciated in *Ex parte Hawk*, 321 U.S. 114.

The fact that the petitioner made no attempt to secure certiorari from the United States Supreme Court to the Superior Court for the County of Bristol to review the

judgment entered on the affirmance of his conviction of murder would not necessarily in all cases preclude the federal District Court from entertaining jurisdiction to inquire into a federal question provided that federal question was presented to, although not considered by, the state court.

Darr v. *Burford,* on writ of certiorari to U.S. Court of Appeals for the Tenth Circuit, decided by the United States Supreme Court April 3, 1950.
Wade v. *Mayo,* 334 U.S. 672.
White v. *Ragen,* 324 U.S. 760.

In the case of *Darr* v. *Burford,* cited above, this court said:

"The sole issue is whether comity calls for review here before a lower federal court may be asked to intervene in state matters. We answer in the affirmative. Such a rule accords with our form of government. Since the states have the major responsibility for the maintenance of law and order within their borders, the dignity and importance of their role as guardians of the administration of criminal justice merits review of their acts by this Court before a prisoner, as a matter of routine, may seek release from state process in the district courts of the United States. It is this Court's conviction that orderly federal procedure under our dual system of government demands that the state's highest courts should ordinarily be subject to reversal only by this Court and that a state's system for the administration of justice should be condemned as constitutionally inadequate only by this Court. From this conviction springs the requirement of prior application to this Court to avoid

unseemly interference by federal district courts with state criminal administration."

It is apparently not disputed that the Massachusetts Supreme Judicial Court, in passing upon the error assigned by the petitioner in the denial by the trial judge of the petitioner's motion to engage medical experts for him, placed its decision upon the absence of any abuse of judicial discretion, an adequate, non-federal ground. The narrow question is therefore raised whether or not the federal question now relied upon by the petitioner and founded on the same assignment of error was ever presented to the state court for consideration.

(*a*) The District Court rightly concluded that the federal claim made in the present proceedings was not at any time presented to nor relied upon in the Supreme Judicial Court of Massachusetts.

It would seem to be unnecessary to restate the facts and circumstances which compel this conclusion; they have already been cogently analyzed by the District Court in its memorandum of decision. Thus at pages 33 and 34 of the record in this case (85 F. Supp. 415, 416, 417) Ford, J., states:

> "The Massachusetts Supreme Court in its decision made no reference to any federal question. In the petitioner's assignments of error on his appeal there was no specific reference made to nor reliance placed upon any federal question. The petitioner relied upon the ground that the denial of his motion was an abuse of discretion and reversible error for this reason. It is true that the petitioner in his brief stated that a denial of his motion by the lower court judge deprived him of his constitutional rights but there was no claim that his federal constitutional rights were violated. This claim was not specifically called to the court's

attention nor was it argued. The petitioner could hardly expect the Supreme Court to know what constitutional rights of his were violated when he failed to call their attention to what specific constitutional right he had in mind if indeed he had any. It seems from all the circumstances that the phrase 'constitutional rights' in the brief was used in the broad and general sense that all rights, even statutory as was the right he claimed, must be consistent with some constitution without referring to any particular constitution. But the petitioner failed even remotely to refer to any specific constitutional right under either the federal or state constitution. And in his brief the petitioner particularized the manner in which his rights were violated, viz., 'that failure to do so constituted an abuse of judicial discretion,' a denial of a state statutory right. And it is clear from the Supreme Court's opinion that the court regarded the error assigned as one involving merely a claimed abuse of discretion by the court below and disposed of the claimed error on that ground. At the oral argument before me I inquired of counsel whether any claim was made in the oral argument before the Full Bench of the Massachusetts Supreme Court that a federal right was claimed and candid replies of counsel to this court indicated unquestionably that no federal question was claimed in oral argument nor was any reference made to such by counsel for the petitioner. It clearly appears that the Supreme Court was unaware that any federal claim was being made before it with respect to the denial of the motion of the petitioner in the court below. What it had a right to assume and evidently did assume was that the appellant there was basing his claim of error on a non-federal ground, i.e., an abuse of discretion by the court

below in denying his motion, obviously a state ground."

It is apparent, therefore, that the petitioner here never presented the federal claim now relied upon to the Supreme Judicial Court of Massachusetts. Nor was it the duty of that court to search out the issue which was not specifically called to its attention. The practice followed by the state court in situations such as this is set forth in *Rosenthal* v. *Liss*, 269 Mass. 373, 375:

> "Commonly we accept a case as it is presented by the parties and assume that points not presented by either party in argument are waived. 'Questions which merely lurk in the record,' capable of being raised but not urged by the parties, are not ordinarily searched out by the court but are passed in silence. . . ."
>
> See also *Vigeant* v. *Postal Telegraph Cable Co.*, 260 Mass. 335, 344.

> "It is a general principle that the court undertakes to prevent any miscarriage of justice so far as permissible under the law. *Noyes* v. *Noyes*, 224 Mass. 125, 134. *Anderson* v. *Beacon Oil Co.* 281 Mass. 108, 110. But the court ought not to be burdened with the unnecessary investigation of questions of law."
>
> *Carangias* v. *Market Men's Relief Association, Inc.*, 293 Mass. 284, 285.

(*b*) There are available to the petitioner in the state courts adequate corrective processes by which the constitutional issue relied upon by the petitioner can now be raised and determined.

If, as the petitioner now contends, the Massachusetts trial court in denying his motion committed an error of law which resulted in the violation of a right guaranteed to him by the Fourteenth Amendment of the United States Constitution, there is still available adequate procedure to correct such error of law in the Massachusetts courts.

Of course, the petitioner, by failing to act within the period of limitation, is barred from securing a new trial under G.L. (Ter. Ed.) c. 278, § 29, as appearing in St. 1939, c. 271, § 1.

Commonwealth v. *Sacco,* 261 Mass. 12.

But it is clear that the petitioner can raise the federal claim on which he now relies by means of a writ of error. Thus G.L. (Ter. Ed.) c. 250, § 9, provides:

> "A judgment in a criminal case may be re-examined and reversed or affirmed upon a writ of error for any error in law or in fact."

It is further provided by section 11 of the same chapter:

> "A writ of error upon a judgment for a capital crime, murder in the second degree or manslaughter, or any other felony made subject to sections thirty-three A to thirty-three G, inclusive, of chapter two hundred and seventy-eight as provided in section thirty-one of said chapter, shall not issue, unless allowed by a justice of the supreme judicial court after notice to the attorney general or other attorney for the commonwealth; but a writ of error upon a judgment in any other criminal case shall issue as of course, but it shall not stay or delay the execution of the judgment or sentence, unless by an express order of a justice of the supreme judicial court, who may make a further order for the custody of the plaintiff in error or for releasing him on bail."

No question as to the availability or appropriateness of the remedy was raised by the court in *Allen* v. *Commonwealth,* Mass. Adv. Sh. (1949) 879, which was a writ of error brought by one convicted of murder in the second degree nearly sixteen years after his conviction and assigning as error that he was tried without the benefit of counsel in violation of his rights under article 12 of the Declaration of Rights of the Constitution of Massachusetts and under the Fourteenth Amendment to the Constitution of the United States.

See also *Commonwealth* v. *Marsino,* 252 Mass. 224, 227-228.
Dascalakis v. *Commonwealth,* 244 Mass. 568.
O'Leary, Petitioner, Mass. Adv. Sh. (1950) 21.
Compare *Commonwealth* v. *Sacco,* 261 Mass. 12, 16-17.

Even if the remedy by writ of error were not available to this petitioner, it would appear that the Massachusetts Supreme Judicial Court has ample statutory power to bring before them any judicial proceedings for the purpose of revising and correcting them. Thus G.L. (Ter. Ed.) c. 211, § 3, provides:

> "The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue writs of error, certiorari, mandamus, prohibition, quo warranto and all other writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws."

Furthermore, an application may be addressed by the petitioner to the Massachusetts Supreme Judicial Court for a rehearing of the case of *Commonwealth* v. *McGarty,*

323 Mass. 435. True it is that such an application is addressed exclusively to the discretion of the court and has no standing under the laws as a recognized part of the procedure of the Supreme Judicial Court.

> *Winchester* v. *Winchester,* 121 Mass. 127, 130.
> *Pepper* v. *Old Colony Trust Co.,* 268 Mass. 467, 469-470.

But, as was pointed out by Knowlton, C.J., in *Powers* v. *Sturtevant,* 200 Mass. 519, at pages 520, 521:

> "On the other hand, if by any accident, oversight or inadvertence a wrong conclusion should be reached in any case, the judges who made the decision presumably would be more desirous than any one else to correct the error. Accordingly, in such a case they would welcome a suggestion in the interest of justice, from anybody, at any time while they have power to revise the decision. The practice of the court in reference to such suggestions from a party is stated in *Wall* v. *Old Colony Trust Co.* 177 Mass. 275, 278, as follows: 'Such an application has no standing under our laws as a recognized part of our procedure, but is received only as friendly information to the justices of an oversight or manifest error, which in the opinion of the justices should call for correction or reargument. Argument is not heard upon such an application, nor should the application itself contain any argument, but it should suggest the error relied on.' If such a suggestion indicates an error, the court, on its own motion, will do anything in its power to accomplish justice and protect the rights of the parties."

It follows from the foregoing that the petitioner cannot be said to have exhausted his state court remedies, inasmuch as he failed to present the federal claim now relied

upon in his appeal to the Massachusetts Supreme Judicial Court. Further, if, as the petitioner now claims, the Massachusetts trial court committed an error of law in denying his motion, there are available procedures to correct an error of law in a criminal case in the Massachusetts courts. Therefore the United States District Judge in the court below rightly concluded that the petitioner's petition should be dismissed.

II. THE PETITIONER HAS NOT BEEN DENIED DUE PROCESS OF LAW, NOR HAS HE BEEN DEPRIVED OF ANY RIGHT IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The petitioner's conviction and sentence were not a deprivation of his liberty without due process of law, in violation of the Fourteenth Amendment, because of the trial court's denial of his motion that he be "allowed to employ two psychiatrists at the expense of the Commonwealth so that he may properly defend himself against the crime as charged by the Commonwealth."

As was pointed out by the Supreme Court of the United States in *Snyder* v. *Massachusetts,* 291 U.S. 97, at page 105:

> "The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. *Twining* v. *New Jersey,* 211 U.S. 78, 106, 111, 112; *Rogers* v. *Peck,* 199 U.S. 425, 434; *Maxwell* v. *Dow,* 176 U.S. 581, 604; *Hurtado* v. *California,* 110 U.S. 516; *Frank* v. *Mangum,* 237 U.S. 309, 326; *Powell* v. *Alabama,* 287 U.S. 45, 67. Its procedure does not run foul of the Fourteenth Amend-

ment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar. Consistently with that amendment, trial by jury may be abolished. *Walker* v. *Sauvinet*, 92 U.S. 90; *Maxwell* v. *Dow, supra; N.Y. Central R. Co.* v. *White*, 243 U.S. 188, 208; *Wagner Electric Co.* v. *Lyndon*, 262 U.S. 226, 232. Indictments by a grand jury may give way to informations by a public officer. *Hurtado* v. *California, supra; Gaines* v. *Washington*, 277 U.S. 81, 86. The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state. *Twining* v. *New Jersey, supra.* What may not be taken away is notice of the charge and an adequate opportunity to be heard in defense of it. *Twining* v. *New Jersey, supra; Powell* v. *Alabama, supra*, pp. 68, 71; *Holmes* v. *Conway*, 241 U.S. 624; Cf. *Blackmer* v. *United States*, 284 U.S. 421, 440."

This principle has been reaffirmed by the Supreme Court of the United States as recently as *Bute* v. *Illinois*, 333 U.S. 640, where, at page 656, the court declared:

"After exhaustive consideration of the subject, this Court has decided that the Fourteenth Amendment does not, through its due process clause or otherwise, have the effect of requiring the several states to conform the procedure of their state criminal trials to the precise procedure of the federal courts, even to the extent that the procedure of the federal courts is prescribed by the Federal Constitution or Bill of Rights. There is nothing in the Fourteenth Amendment specifically stating that the long recognized and then existing power of the states over the procedure of their own courts in criminal cases was to be prohibited or even limited."

There is no question here involved of denying compulsory process to the petitioner to summon witnesses necessary to his defense. Such right is expressly conferred by G.L. (Ter. Ed.) c. 277, § 66.

The procedure followed by the trial court was in accord with the practice of long standing in the Massachusetts courts and was pre-eminently fair to the petitioner. Thus the petitioner was examined by two physicians and a report of their findings was submitted to the trial court as provided by G.L. (Ter. Ed.) c. 123, § 100A, as amended by St. 1941, c. 194, § 11 (R. 14, 16, 17, 18, 19, 20). In enacting this statute, the Massachusetts Legislature set up elaborate safeguards to insure that a person indicted for a capital offense should be examined by impartial experts to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility. Among these safeguards were the following:

1. The clerk of the court in which the indictment is returned must notify the department of mental health of the indictment.

2. The department shall cause the person indicted to be examined with a view to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility.

3. The department must file a report of its investigation with the clerk of the court in which the trial is to be held.

4. The report shall be accessible to the court, the probation officer thereof, the district attorney and to the attorney for the accused.

In this manner, the initiation of the examination, the selection of the examining psychiatrists, and the report of their findings is screened and protected from any possibility of influence on the part of the prosecution or the defense. And the diagnosis of these experts is made avail-

able equally to all parties, the court, the district attorney, and the attorney for the defense.

Concerning the operation of this statute it was said by Rugg, C.J., in *Commonwealth* v. *Devereaux*, 257 Mass. 391, at page 396:

> "The 'department of mental diseases' [1] has the general supervision of all public and private institutions for insane, feebleminded or epileptic persons. G.L. c. 123, § 3. It is a matter of general knowledge that there are in the service of the Commonwealth under this department persons eminent for special scientific knowledge as to mental diseases. The examination under the statute, therefore, may fairly be assumed to have been made by competent persons, free from any predisposition or bias and under every inducement to be impartial and to seek for and to ascertain the truth."

See also *Commonwealth* v. *DiStasio*, 294 Mass. 273, 283.

It appears from the record in this case that the report of the department of mental health which was filed December 23, 1947 (R. 14), was available to the trial judge when, on January 26, 1948 (R. 14), he heard argument of counsel and denied the motion of the petitioner that he be permitted to engage other medical experts at the expense of the Commonwealth.

> "Having been examined by impartial experts the defendant was not entitled as of right to a further examination at the public expense."

Commonwealth v. *Belenski*, 276 Mass. 35, 44.

[1] Now the "department of mental health," see St. 1941, c. 194.

Possibly, as was assumed by the court in *Commonwealth* v. *McGarty*, 323 Mass. 435, 437, the trial judge could have allowed the petitioner's motion under G.L. (Ter. Ed.) c. 277, § 56, but only upon a showing of some compelling necessity for such action.

See Massachusetts Superior Court Rules (1932), Rule 96.

Long before the enactment of G.L. (Ter. Ed.) c. 123, § 100A, in 1921 (see St. 1921, c. 415), the Massachusetts Supreme Judicial Court had displayed a realistic attitude with respect to permitting an indigent defendant to hire experts at public expense. The view of the Massachusetts court on this subject was expressed in *Attorney General, petitioner*, 104 Mass. 537, at pages 543, 544:

> "Whenever the prosecuting officer thinks the interests of justice require it, we do not doubt that he is authorized, by the statutes above mentioned, to employ experts to make proper investigations for ascertaining the truth of a case, and that it is proper for him in some capital cases to enable the prisoner's counsel to make similar investigations, and to procure the attendance of experts at the trial, if the prisoner is not able to do so; and the court is authorized to allow a reasonable compensation to such experts for their services, both for attending the trial and for their prior investigations. This is not on the ground that the statute has given to a prisoner the right to such aid at the expense of the public treasury; but on the ground that it is for the interest of the Commonwealth, in the case then before the court, that all proper investigations should be made, in order to guard against the danger of doing injustice to the prisoner in a case where he is exposed to so great a penalty.

> The experts selected by the attorney general ought to testify with impartiality, and without any bias against the prisoner, and it is to be presumed that he will select able and impartial experts only. So it is the duty of all experts called in any case, to testify with impartiality; but it is notorious that experts are called by parties in many cases who are governed in their investigations and their testimony by a partisan desire to aid the party that employs them, and not by an impartial desire to present fairly the truth of the case. In consequence of this, the testimony of experts has often been brought into discredit. We do not think the prosecuting officer or the court would be authorized to allow the charges of all such persons as the prisoner would have a right to employ as experts at his own expense, without regard to their character or to the need of employing them in the case."

See also *Clark, petitioner,* 104 Mass. 537.

But no compelling reason is apparent from the record in this case why the trial judge should have exercised his discretion and allowed the petitioner's motion. There is no suggestion that the provisions of G.L. (Ter. Ed.) c. 123, § 100A, were not complied with. There is no suggestion that doctors R. M. Chambers and Roderick B. Dexter were not competent psychiatrists. There is no suggestion that these doctors were not impartial; or that they were not free from any predisposition or bias. There is no suggestion that the conclusion of these psychiatrists that the petitioner was neither feebleminded nor insane and that he does know the difference between right and wrong, but that he was a psychopathic personality, is not a true, accurate and impartial diagnosis of his mental condition. There is no suggestion that the report of the department

of mental health was not made available to counsel for the petitioner. There is no suggestion that the petitioner intended to, or did in fact, rely upon insanity as a defense. As a matter of fact, all that does appear in this record is a suggestion that the petitioner was unable to engage competent medical experts to examine, assist and advise in the preparation of his defense. But it nowhere appears, nor, in view of the report of the impartial expert psychiatrists, is it a warrantable inference, that the petitioner thereby was harmed or deprived of any rights guaranteed by the Constitution of the United States.

In view of the foregoing, it is submitted that the well-established practice of the Massachusetts courts with respect to the examination by impartial psychiatric experts of persons indicted for capital offenses and the denial by the trial judge in this case of the petitioner's motion to be allowed to engage other psychiatrists at the public expense does not offend any principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental.

While federal court practice does not establish a constitutional minimum standard of due process which must be observed in each state under the Fourteenth Amendment, yet such practice does afford an example approved by the courts of the United States.

> "It thus contributes something toward establishing a general standard of due process currently and properly applicable to the states under the Fourteenth Amendment."

Bute v. *Illinois*, 333 U.S. 640, 659-660.
See also *Betts* v. *Brady*, 316 U.S. 455, 461-462.

But it is well established that the Sixth Amendment to the United States Constitution, which confers upon a de-

fendant the right to compulsory process for the attendance of witnesses, does not require the payment by the government of the expenses of the witnesses.

Casebeer v. *Hudspeth*, 121 F. (2d) 914, 916 (C.C.A. 10th).
Brewer v. *Hunter*, 163 F. (2d) 341, 342 (C.C.A. 10th).
United States v. *Fore*, 38 F. Supp. 142 (D.C. S.D. Cal.).
See Title 18 U.S.C. § 3005 (Supp. II, 1948).

The right to summon witnesses at the expense of the government is addressed to the sound discretion of the trial court, and the exercise of that discretion is not reviewable.

Goldsby v. *United States*, 160 U.S. 70, 73.
Gates v. *United States*, 112 F. (2d) 571.
See Federal Rules of Criminal Procedure, Rule 17 (b).
United States v. *Fox*, 19 F. Supp. 463 (D.C. S.D. N.Y.).

It therefore appears that even under the Sixth Amendment, binding upon the federal courts, due process does not require that the government pay the expenses of witnesses of an indigent defendant. *A fortiori*, the due process clause of the Fourteenth Amendment imposes no such requirement upon the states.

Crews v. *State*, 143 Fla. 263, 268.
Osborn v. *People*, 83 Colo. 4, 11.
Greene v. *Ballard*, 174 Ky. 808, 818-819.
Roberts v. *The State*, 94 Ga. 66, 72.
State v. *Nathaniel*, 52 La. Ann. 558, 564.
State v. *Waters*, 39 Me. 54.
Commonwealth v. *Williams*, 13 Mass. 501.

Conclusion.

The respondent respectfully submits that the District Court Judge properly dismissed the petition for a writ of habeas corpus because the petitioner, since he has never raised in the state court the constitutional issue relied upon as the basis for his petition and since there are available to him in the state courts adequate corrective processes by which this issue can be raised and determined, has not exhausted at least one of his available remedies in the state courts. But, in any event, the petitioner has not been denied due process of law in the courts of Massachusetts nor has he been deprived of any right in violation of the Fourteenth Amendment of the Constitution of the United States.

Respectfully submitted,

FRANCIS E. KELLY,
Attorney General of the
Commonwealth of Massachusetts,

HENRY P. FIELDING,
Assistant Attorney General,

LAWRENCE E. RYAN,
Assistant Attorney General,

MAURICE M. LYONS,
District Attorney, Southern District,
Attorneys for Respondent.

Appendix.

18 U.S.C. § 3005:

"Whoever is indicted for treason or other capital crime shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, who shall have free access to him at all reasonable hours. He shall be allowed, in his defense to make any proof that he can produce by lawful witnesses, and shall have the like process of the court to compel his witnesses to appear at his trial, as is usually granted to compel witnesses to appear on behalf of the prosecution."

Federal Rules of Criminal Procedure, Rule 17 (b):

"The court or a judge thereof may order at any time that a subpoena be issued upon motion or request of an indigent defendant. The motion or request shall be supported by affidavit in which the defendant shall state the name and address of each witness and the testimony which he is expected by the defendant to give if subpoenaed, and shall show that the evidence of the witness is material to the defense, that the defendant cannot safely go to trial without the witness and that the defendant does not have sufficient means and is actually unable to pay the fees of the witness. If the court or judge orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government."

G.L. (Ter. Ed.) c. 123, § 100A, as amended by St. 1941, c. 194, § 11:

"Whenever a person is indicted by a grand jury for a capital offense or whenever a person, who is known to have been indicted for any other offense more than once or to have been previously convicted of a felony, is indicted by a grand jury or bound over for trial in the superior court, the clerk of the court in which the indictment is returned, or the clerk of the district court or the trial justice, as the case may be, shall give notice to the department, which shall cause such person to be examined with a view to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility. Whenever the probation officer of such court has in his possession or whenever the inquiry which he is required to make by section eighty-five of chapter two hundred and seventy-six discloses facts which if known to the clerk would require notice as aforesaid, such probation officer shall forthwith communicate the same to the clerk who shall thereupon give such notice unless already given. The department shall file a report of its investigation with the clerk of the court in which the trial is to be held, and the report shall be accessible to the court, the probation officer thereof, the district attorney and to the attorney for the accused. In the event of failure by the clerk of a district court or the trial justice to give notice to the department as aforesaid, the same shall be given by the clerk of the superior court after entry of the case in said court. Upon giving the notice required by this section the clerk of a court or the trial justice shall so certify on the papers. The physician making such examination shall, upon certification by the department, receive the same fees and traveling expenses as provided in section seventy-three for the examination of persons committed to institutions and such fees and expenses shall be paid in the same manner as

provided in section seventy-four for the payment of commitment expenses. Any clerk of court or trial justice who wilfully neglects to perform any duty imposed upon him by this section shall be punished by a fine of not more than fifty dollars."

G.L. (Ter. Ed.) c. 277, § 56:

"The reasonable expenses incurred and paid by counsel assigned by the court for the defence of a person indicted for murder, who is otherwise unable to procure counsel, shall be paid by the county where the indictment is found after approval by a justice sitting at the trial or other proceedings of the case."

G.L. (Ter. Ed.) c. 277, § 66:

"A prisoner indicted for a crime punishable with death or imprisonment for life, upon demand by him or his counsel upon the clerk, shall have a list of the jurors who have been returned and process to summon witnesses who are necessary to his defence, at the expense of the commonwealth."

G.L. (Ter. Ed.) c. 278, § 29 as appearing in St. 1939, c. 271, § 1:

"The superior court may, at the sitting in which a complaint or indictment is tried, or within one year thereafter, upon motion in writing of the defendant, grant a new trial for any cause for which by law a new trial may be granted, or if it appears to the court that justice has not been or cannot be done, and upon such terms or conditions as the court shall order. Said court may grant a new trial at any time after said year, if it finds that the certification required to be made of the transcript of the evidence in a

case tried under sections thirty-three A to thirty-three G, inclusive, cannot be had within two years after such case is tried and that the defendant or his counsel has seasonably performed all acts necessary under said sections toward the perfection of his appeal."

Superior Court Rules (1932), Rule 96:

"The court will not allow compensation for the services of an expert or expert witness for the defense in a capital case unless an order of the court or a justice, naming such expert or expert witness and authorizing his employment, was made before he was employed. Such order shall not be made without notice to the district attorney in charge of the case, and an opportunity to be heard."